Affd — 20-189

Judge Drummond

Judge Drummond

Judge Drummond

SUPREME COURT OF THE UNITED STATES.

No. 566.

HERMAN J. PAHLMAN, DAVID G. RUSH, AND CHARLES WELSH, PLAINTIFFS IN ERROR,

vs.

HERMAN RASTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in said district, on Wednesday, the sixth day of August, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

HERMAN J. PAHLMAN, DAVID G. RUSH, AND Charles Welsh,
vs.
HERMAN RASTER. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fourteenth day of March, A. D. 1873, came Herman Raster, by his attorney, and filed in the office of the clerk of the circuit court of the United States for said district,
2 at Chicago, in the district aforesaid, and filed his petition for the removal of said entitled cause. Which said petition is in words and figures following, to wit:

Petition to remove cause.

Circuit court of the United States of America for the northern district of Illinois.

To the honorable judges of the circuit court of the United of America for the northern district of Illinois.

The petition of Herman Raster respectfully showeth that prior to the commencement of the suit hereinafter referred to, the said Herman Raster was collector of internal revenue for the first collection district of the State of Illinois, appointed under, and acting by authority of, the act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June thirtieth, eighteen hundred and sixty-four, and the acts in addition thereto and in amendment thereof, that heretofore, to wit: On the eleventh day of February, in the year of
3 our Lord one thousand eight hundred and seventy-three, an action of assumpsit was commenced against your petitioner by Herman J. Pahlman, David G. Rush, and Charles Welsh, partners, by and under the names, style, & firm of H. J. Pahlman & Co., in the circuit court of Cook County, in the State of Illinois, on account of acts done by your petitioner as such officer as aforesaid, acting under color of his said office and by authority of the acts of Congress aforesaid.

That your petitioner has been served with process in said suit in the northern district of Illinois, and that no trial of said suit has been had.

Your petitioner therefore prays that, in pursuance of the act of Congress in such case made and provided, the said suit so commenced in the said circuit court of Cook County may be removed therefrom and entered upon the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court.

And your petitioner will ever pray, &c.

4 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Herman Raster, the above named petitioner, being duly sworn, deposes and says that the matters set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

HERMAN RASTER.

Sworn to before me this 13th day of March, 1873.

[SEAL.] PHILIP A. HOYNE,
U. S. Commissioner, Northern Dist. Illinois.

NORTHERN DISTRICT OF ILLINOIS,
CHICAGO, ILL., *Ma'h* 14*th*, 1873.

I, Joseph O. Glover, certify that, as counsel for the petitioner, I have examined the proceedings against him, and have carefully inquired into all the matters set forth in the above petition, and that I believe the same to be true.

J. O. GLOVER,
Counsellor of the said Circuit Court.

(Endorsed:) Filed March 14, 1873. W'm H. Bradley, cl'k.

5 On the same day, to wit: the 14th day of March, A. D. 1873, a writ of certiorari issued out of said clerk's office as prayed in said petition. Which said writ, together with the return of the marshal thereon, is in words and figures following, to wit:

Certiorari.

Circuit court of the United States, northern district of Illinois.

The United States of America to the circuit court of Cook County, in the State and northern district of Illinois, greeting:

Whereas it hath been represented to us by the petition of Herman Raster, verified by his affidavit, and accompanied by the certificate of Joseph O. Glover, esq., his attorney, that a certain suit in an action of assumpsit was lately commenced, and is now pending, in the circuit court of Cook County, in the State & northern district of Illinois, wherein Herman J. Pahlman, David G. Rush, and Charles Welsh are the plaintiffs, and said Herman Raster, as the late collector of in-
6 ternal revenue of the United States for the first collection district in Illinois, is the defendant, and praying that said cause be removed to the circuit court of the United States for the northern district of Illinois, under and by virtue of the sixty-seventh section of the internal revenue law, approved March 20, 1864.

You are therefore hereby commanded that you do forthwith, without excuse or delay, remove to the circuit court of the United States for the northern district of Illinois, the record and proceedings in said cause, without addition or diminution, that speedy justice may be done to the party aforesaid.

And have you then and there this writ, with your return thereon.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago, in said district, this fourteenth day of March, A. D. 1873, and of our Independence
7 the 97th year.

W'M H. BRADLEY, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that I have appointed, and by these presents do appoint, N. J. Adams my true and lawful deputy to serve the writ, of which the annexed is a true copy, (Herman J. Pahlman et al. vs. Herman Raster, as the late collector, &c.,) and to make true return of the service thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have, this 14th day of March, A. D. 1873, served the writ of which the paper-writing hereto attached is a true copy upon the circuit court of Cook County, in the State and northern district of Illinois therein mentioned, by delivering the same to Jacob Gross, the clerk of said court.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.
By N. J. ADAMS,
Special Deputy.

8 N. J. Adams, being first duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return.

Sworn to before me this 14th day of March, A. D. 1873.
[SEAL.] PHILIP A. HOYNE,
U. S. Com'r for Nor. Dist. Ill's.

(Endorsed:) Filed March 26, 1873. W'm H. Bradley, cl'k.

On this day, to wit, the 29th day of March, A. D. 1873, the following transcript of record of the circuit court of Cook County, Illinois, together with the original præcipe and declaration, were returned into said United States court. Which said transcript and said præcipe and declaration are respectively in words and figures following to wit:

Transcript from State court.

UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Pleas before the honorable the judges of the circuit court of
9 Cook County, at a term thereof begun and held at Chicago, in said county and State, on the third Monday, being the seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh. Present, the honorable Erastus S. Williams, chief justice of the circuit court of Cook County, State of Illinois; W. W. Farwell, Henry Booth, John G. Rogers, Lambert Tree, judges; Charles H. Reed, State's attorney; Timothy M. Bradley, sheriff.

Attest:

JACOB GROSS, *Clerk.*

HERMAN I. PAHLMAN ET AL.
vs. } 5853. Ass't.
HERMAN RASTER.

On reading and filing the writ of certiorari, issued out of the United States circuit court for the northern district of the State of Illinois,

bearing date March 14th, A. D. 1873, ordered, that said cause
10 be and it is hereby transferred into said United States circuit court for the northern district of Illinois, according to act of Congress in such case made and provided.

STATE OF ILLINOIS,
Cook County, ss:

I, Jacob Gross, clerk of the circuit court of Cook County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all proceedings had and entered of record in a certain cause lately pending in said court on the common law side thereof, between Herman I. Pahlman et al., *are* plaintiffs, and Herman Raster, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Chicago, in said county, this 14th day of March, 1873.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed:) Filed May 29, 1873. W'm H. Bradley, clerk.

11 *Præcipe.*

STATE OF ILLINOIS,
County of Cook:

Of the March term, A. D. 1873, of the Cook County circuit court.

HERMAN I. PAHLMAN, DAVID G. RUSH, AND Charles Welsh, partners by and under the names, style, and firm of H. I. Pahlman & Co., *vs.* HERMAN RASTER.	Assumpsit; damage, five thousand dollars.

The clerk will please issue summons in the above-entitled cause, returnable to the March term, A. D. 1873, of the Cook County circuit court.

SCATES, OLNEY & WHITNEY,
Attorneys for Plaintiffs.

(Endorsed:) Filed Feb'y 11, 1873. Jacob Gross, cl'k. Filed May 29, 1873. W'm H. Bradley, cl'k.

12 *Declaration.*

STATE OF ILLINOIS,
County of Cook, ss:

Of the March term, A. D. 1873, of the circuit court.

Herman I. Pahlman, David G. Rush, and Charles Welsh, partners by and under the name, style, and firm of H. I. Pahlman & Co., plaintiffs in this suit, by Scates, Olney & Whitney, their attorneys, complain of Herman Raster, the defendant in this suit, who has been summoned, &c., of a plea of trespass on the case upon promises.

For that whereas the said plaintiffs, partners as aforesaid, on or about the first day of August, A. D. 1870, designing and intending to engage in the business of distilling alcohol from grain at the city of Chicago,

in the first congressional district of the State of Illinois, to wit, at the county aforesaid, did give to the assessor of internal revenue for
13 the said first congressional district of the State of Illinois a notice, as provided and required in the 6th section of an act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20th, 1868, wherein said plaintiffs gave notice, among other things, as required by law and the regulations of the Commissioner of Internal Revenue, that they, the said plaintiffs, would ferment each tub of mash or beer used by them in the manufacture of alcohol as aforesaid for the period of seventy-two hours; and the said plaintiffs did also thereafter, to wit, on or about the day and year aforesaid, execute a bond as such distillers as required by the 7th section of said act of Congress, and did in all other respects comply with the provisions of said act of Congress and the regulation of the Commissioner of Internal Revenue, and did then and there enter upon the business of so distilling alcohol from grain, and from thence until the first day of September, A. D. 1871, did continue to give like notice from year to year, among other things, that they would ferment each tub of mash or beer for sev-
14 enty-two hours, and did renew their bond as such distillers and in all other respects did comply with the act of Congress aforesaid and the regulations of the Commissioner of Internal Revenue thereunder, and did during all the time aforesaid continue to manufacture alcohol by distillation from grain as aforesaid, and did during the whole period aforesaid continue to ferment each tub of mash or beer for the space of seventy-two hours, in accordance with said notice, to wit, at the county and State aforesaid.

And whereas, also, on or about the first day of January, A. D. 1871, the said defendant, Herman Raster, was appointed and entered upon the duties of the office of collector of internal revenue of the United States for the first congressional district of the State of Illinois, to wit, at the county aforesaid, and so continued to be and to perform the duties of such collector from thence until about the first day of October, A. D. 1871, and the said defendant, as such collector, did, during such period of time, then and there demand and collect of and from
15 the said plaintiffs as such distillers, from month to month, during the term aforesaid, certain sums of money as and for the per diem capacity tax of the said plaintiffs' distillery, under the said act of Congress of July 20th, 1868, as aforesaid, that is to say:

For twenty-four distilling days in the month of February, A. D. 1871, said defendant collected the sum of sixteen hundred & thirty-two dollars on sixteen thousand three hundred & twenty bushels of grain.

For the twenty-seven distilling days in the month of March, A. D. 1871, said defendant collected the sum of eighteen hundred and thirty-six dollars on eighteen thousand three hundred & sixty bushels of grain.

For the twenty-five distilling days in April, A. D. 1871, said defendant collected seventeen hundred dollars on seventeen thousand bushels of grain.

For the twenty-seven distilling days in May, A. D. 1871, said defendant collected eighteen hundred & thirty-six dollars on eighteen thousand three hundred and sixty bushels of grain.

For the twenty-six distilling days in June, A. D. 1871, said de-
16 fendant collected seventeen hundred & sixty-eight dollars on seventeen thousand six hundred and eighty bushels of grain; and

For the sixteen distilling days in July, A. D. 1871, said defendant collected one thousand & eighty-eight dollars on ten thousand eight

hundred & eighty bushels of grain, to wit, at the county and State aforesaid.

And the said plaintiffs aver, and in fact say, that the said several monthly sums thus collected were predicated upon the producing capacity of said distillery upon the basis of a fermenting period of forty-eight hours, the same being according to the survey. And the said plaintiffs further aver that the commissioner of internal revenue did, previous to the making of the survey of the plaintiffs' said distillery for the purpose of making the assessment upon which the above collection was predicated, order and instruct the assessor of internal revenue for the said 1st congressional district of Illinois to make the assessment upon a basis of a fermenting period of forty-eight hours.

And the said plaintiffs further aver that, in truth and in fact, the actual fermenting period used by the said plaintiffs during the months aforesaid was seventy-two hours, in strict accordance with the notice given by them, the said plaintiffs, as hereinbefore set forth.

And the said plaintiffs further aver and say that the true producing-capacity of the said plaintiffs' said distillery was as follows, that is to say:

17 For the month of February, A. D. 1871, twelve thousand bushels of grain, and the per diem capacity-tax thereon would be twelve hundred dollars.

For the month of March, A. D. 1871, thirteen thousand & five hundred bushels of grain, and the per diem capacity-tax ther'on would be thirteen hundred & fifty dollars.

For the month of April, A. D. 1871, twelve thousand five hundred bushels of grain, and the per diem capacity-tax thereon would be twelve hundred and fifty dollars.

For the month of May, A. D. 1871, thirteen thousand and five hundred bushels of grain, and the per diem capacity-tax thereon would be thirteen hundred & fifty dollars.

For the month of June, A. D. 1871, thirteen thousand bushels of grain, and the per diem capacity-tax thereon would be thirteen hundred dollars.

For the month of July, A. D. 1871, eight thousand bushels of grain, and the per diem capacity-tax thereon would be eight hundred dollars.

And the said plaintiffs further aver and say that the said defendant, Herman Raster, as such collector as aforesaid, to wit, at the county aforesaid, asked, demanded, and received of and from the said plaintiffs,

18 as such distillers as aforesaid, as and for the per diem capacity-tax of said distillery: for the month of February, A. D. 1871, the sum of four hundred & thirty-two dollars on four thousand three hundred & twenty bushels of grain, both in excess of the true producing capacity of said distillery for said month.

For the month of March, A. D. 1871, the sum of four hundred & eighty-six dollars on four thousand eight hundred & sixty bushels of grain, both in excess of the true producing capacity of said distillery for said month.

For the month of April, A. D. 1871, the sum of four hundred & fifty dollars on four thousand five hundred bushels of grain, both in excess of the true producing capacity of said distillery for said month.

For the month of May, A. D. 1871, the sum of four hundred & eighty-six dollars on four thousand and eight hundred & sixty bushels of grain, both in excess of the true producing capacity of said distillery for that month.

For the month of June, A. D. 1871, the sum of four hundred & sixty-

eight dollars on four thousand six hundred & eighty bushels of grain, both being in excess of the true producing capacity of said distillery for that month.

19 For the month of July, A. D. 1871, the sum of two hundred & eighty-eight dollars on two thousand eight hundred & eighty bushels of grain, both being in excess of the true producing capacity of said distillery for that month, making an aggregate amount in excess of the true producing capacity of said distillery for the months aforesaid of two thousand six hundred & ten dollars, and twenty-six thousand & one hundred bushels of grain, to wit, at the county and State aforesaid.

And the said plaintiffs do further aver, charge, and say that said defendant then and there at the several times aforesaid, forced and compelled the said plaintiffs to pay, and the said plaintiffs did then and there in fact pay the said several sums of money under protest, to wit, at the county and State aforesaid.

20 And the plaintiffs aver that they did in due form of law, and according to the regulations of the Internal Revenue Bureau, appeal to the Commissioner of Internal Revenue after they, said plaintiffs, had made payment of the taxes to the said defendant, as above stated, for a refunding of the said excess of the said per diem capacity-tax, stating at large the reasons and basis of such claim. And the said plaintiffs further aver that said appeal was overruled and disallowed by the said Commissioner of Internal Revenue within six months before the commencement of this suit; and that the decision of the said Commissioner so overruling and disallowing the said appeal was received by the collector of internal revenue of said 1st congressional district for the time being, and announced to the said plaintiffs before the bringing of this suit.

21 By means whereof the said defendant then and there became liable to pay to the said plaintiffs the said sums of money so as aforesaid illegally exacted and collected from the said plaintiffs. And being so liable, he, the said defendant, afterwards, to wit, on the first day of October, A. D. 1871, at the county aforesaid, undertook and then and there faithfully promised to pay the said several sums of money on request.

22 2. And whereas also the said plaintiffs' partners, as aforesaid, on or about the first day of August, A. D. 1870, intending to engage, in the business of distilling alcohol from grain at the city of Chicago, in the first congressional district of the State of Illinois, to wit, at the county aforesaid, did give to the assessor of internal revenue for the said first congressional district of the State of Illinois a notice, as provided and required in the 6th section of an act entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20th, 1868, wherein said plaintiffs gave notice among other things, as required by law and the regulations of the Commissioner of Internal Revenue, that they, the said plaintiffs, would ferment each tub of mash or beer used by them in the manufactury of alcohol as aforesaid, for the period of seventy-two hours; and the said plaintiffs did thereafter, to wit, on or about the day and year last aforesaid, execute a bond as such distillers, as required by the 7th section of said act of Congress, and did in all other respects comply with the provisions of said

23 act of Congress and the regulations of the Commissioner of Internal Revenue, and did then and there enter upon the business of distilling alcohol from grain, and from thence until the first day of September, A. D. 1871, did continue to give like notice from year to year among other things, that they would ferment each tub of mash or

beer for seventy-two hours, and did renew their bond as such distillers, and in all other respects did comply with the act of Congress aforesaid and the regulations of the Commissioner of Internal Revenue thereunder, and did, during all the time aforesaid, continue to manufacture alcohol by distillation from grain as aforesaid, and did, during the whole period aforesaid, continue to ferment each tub of mash or beer for the space of seventy-two hours in accordance with said notice, to wit, at the county and State aforesaid.

And whereas also, on or about the first day of January, A. D. 1871, the said defendant was appointed and entered upon the duties of the office of collector of internal revenue of the United States for
24 the first congressional district of the State of Illinois, to wit, at the county aforsaid, and so continued to be and to perform the duties of such collector from thence until the first day of October, A. D. 1871, and the said defendant, as such collector, did, during such period of time, then and there demand and collect of and from the said plaintiffs as such distillers from month to month during the term aforesaid, certain sums of money as and for the per diem capacity-tax of the said plaintiffs' said distillery under the said act of Congress approved July 20th, 1868, that is to say, for the months of February, March, April, May, June, and July, A. D. 1871, said defendant collected of and from the said plaintiffs an aggregate amount of nine thousand eight hundred and sixty dollars on ninety-eight thousand and six hundred bushels of grain, to wit, at the county aforesaid.

And the said plaintiffs aver, and in fact say, that the said aggregate sum there collected was predicated upon the producing capacity
25 of said distillery upon a basis of a fermenting period of forty-eight hours.

And the said plaintiffs further aver that in truth and in fact the actual fermenting period used by the said plaintiffs during the months last aforesaid, was seventy-two hours, in strict accordance with the notice given by the said plaintiffs as hereinbefore set forth.

And the said plaintiffs further aver and say that the true producing capacity of the said plaintiffs' said distillery, for and during all the months last aforesaid, was seventy-two thousand and five hundred bushels of grain, and the true per diem capacity-tax thereon would be seven thousand two hundred & fifty dollars.

And the said plaintiffs further aver and say that the said defendant, Sherman Raster, as such collector as aforesaid, to wit, at the county aforesaid, asked, demanded, and received of and from the said plaintiffs as such distillers as aforesaid, as and for the per diem capacity-tax of said distillery for the months last aforesaid, the aggregate and
26 gross sums of two thousand and six hundred and ten dollars on twenty-six thousand and one hundred bushels of grain, both being in excess of the true producing capacity of said distillery for the said months.

And the said plaintiffs do further aver, charge, and say that the said defendant then and there forced and compelled the said plaintiffs to pay, and the said plaintiffs did then and there in fact pay, the said last-mentioned sum of money under protest, to wit, at the county aforesaid.

By means whereof the said defendant then and there became liable to pay to the said plaintiffs the said aggregate sum of money so as aforesaid illegally exacted and collected from the said plaintiffs, and, being so liable, he, the said defendant, afterwards, to wit, on the first day of October, A. D. 1871, at the county aforesaid, undertook, and then and

there faithfully promised the said plaintiffs, to pay the said latter-described sum of money when he, the said defendant, should be thereunto afterwards requested.

3. And whereas also the said defendant afterwards, to wit, on
27 the first day of September, A. D. 1872, at the county aforesaid, was indebted unto the said plaintiffs, partners as aforesaid, in the further sum of five thousand dollars for so much money by the said plaintiffs before that time paid, laid out, and expended to and for the use of the said defendant, and at his special instance and request; (4) and in the further sum of five thousand dollars for so much money by the said defendant before that time had and received to and for the use of the said plaintiffs; (5) and in the further sum of five thousand dollars for so much money before that time and then due and payable from the said defendant to the said plaintiffs for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiffs, and by the said plaintiffs forborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant,
and, being so indebted, he, the said defendant, then and there
28 undertook and faithfully promised the said plaintiffs to pay them the said several sums of money when he, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, not regarding his said several promises and undertakings, although often requested, hath not paid the said several sums of money, nor any of them, nor any part or portion thereof, but he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiffs of five thousand dollars, and therefore they bring suit, &c.

SCATES, OLNEY & WHITNEY,
Att'ys for Plaintiffs.

(Endorsed:) Filed Feb'y 11, 1873. Jacob Gross, cl'k. Filed May 29, 1873. W'm H. Bradley, cl'k.

29 On this day, to wit, the 21st day of June, A. D. 1873, said defendant, by his attorney, filed in said United States court clerk's office his demurrer in said entitled cause. Which said demurrer is in words and figures following, to wit:

Demurrer.

U. S. cir. court.

HERMAN RASTER
ats.
H. J. PAHLMAN ET ALS. } Dec. in assumpsit.

And now comes the said defendant, and saith that the said declaration is not sufficient in law for the said plaintiffs to have & maintain their aforesaid action thereof against them. Wherefore, &c.

J. O. GLOVER, *U. S. Att'y.*

(Endorsed:) Filed June 21, 1873. W'm H. Bradley, cl'k.

On this day, to wit, the 21st day of June, in the May term, A. D. 1873, of said circuit court of the United States for the northern dis-

30 trict of Illinois, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Leave to amend dec., &c.

HERMAN J. PAHLMAN ET AL.
vs.
HERMAN RASTER. } Assumpsit.

On motion of the plaintiffs by their attorney, and with the consent of the defendant by his attorney, leave is given them to file an amended declaration herein, to which the defendant files his demurrer, and the same coming on now to be heard, after the arguments of counsel the court takes the same under advisement.

On this day, to wit, the 19th of July, in the July term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. David Davis, one of the justices of the Supreme Court of the United States, and the Hon. Thomas Drummond, circuit court judge of the United States for the seventh judicial circuit, appears the following entry, to wit:

Hearing on demurrer, &c.

HERMAN J. PAHLMAN ET AL.
vs.
HERMAN RASTER.

31 Now come the parties by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration herein, and after hearing the arguments of counsel the court takes the same under advisement.

On this day, to wit, the 6th day of August, in the July term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Judgment, &c.

HERMAN J. PAHLMAN, DAVID G. RUSH, AND Charles Welsh,
v.
HERMAN RASTER. } Assumpsit.

Now come again the parties by their attorneys, and the demurrer to the declaration having been heretofore heard before the Hon. David Davis and the Hon. Thomas Drummond, and taken under advisement, and now on this day the court being fully advised thereon, Hon. David Davis concurring therein, sustains said demurrer, and the plaint-
32 iffs electing to abide by their said declaration, it is thereupon considered and adjudged by the court that the plaintiffs take nothing by their said suit, and that the defendant do have and recover of and from the said plaintiffs the costs and charges herein taxed at thirty dollars and seventy cents, and that he have execution therefor.

On this day, to wit, the 15th day of August, A. D. 1873, said plaintiffs, by their attorneys, filed in said clerk's office their bond in said entitled cause, which said bond is in words and figures following, to wit:

Bond.

Supreme Court of the United States.

HERMAN J. PAHLMAN ET AL.
vs.
HERMAN RASTER.

Know all men by these presents that we, David G. Rush, one of the partners of the firm of H. J. Pahlman & Co., of Chicago, Cook
33 County, Illinois, are held and firmly bound unto Herman Raster, of Chicago aforesaid, in the sum of five hundred dollars, to be paid to the said Herman Raster, his executors and administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these present, sealed with our seals, dated this 14th day of August, A. D. 1873.

Whereas the above-named Herman J. Pahlman, David G. Rush, and Charles Welsh, composing the firm of H. J. Pahlman & Co., have prosecuted a writ of error to the Supreme Court *Court* of the United States *for the northern district of Illinois*, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the said district:

Now, therefore, the condition of this obligation is such that if the above-named David G. Rush shall prosecute his said writ of
34 error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force & virtue.

DAVID G. RUSH. [SEAL.]
THOMAS LYNCH. [SEAL.]

Sealed & delivered in presence of—

W'M H. BRADLEY.

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed August 15th, 1873. W'm H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss.:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above & foregoing to be a true, correct, & complete transcript of the record of all the proceedings had in said court in said cause, wherein Herman J. Pahlman et al. are plaintiffs and Herman Raster defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office in Chicago, in said district, this fifth day of September, A. D. 1873.

[SEAL.] W'M H. BRADLEY, *Clerk.*

35 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Herman J. Pahlman, David G. Rush, and Charles Welsh, plaintiffs, and Herman Raster, defendant, a manifest error hath happened, to the great damage of the said Herman J. Pahlman, David G. Rush, and Charles Welsh, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
36 United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Nathan Clifford, Acting Chief Justice of the Supreme Court of the United States, this 8th day of August, A. D. 1873, and of our Independence the 98th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S. Northern dist. of Illinois. Herman J. Pahlman et al. vs. Herman Raster. Writ of error.

37 UNITED STATES OF AMERICA, *ss:*

To Herman Raster, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Herman J. Pahlman et als. are plaintiffs, & you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court of the United States, this 16th day of August, A. D. 1873.

THOMAS DRUMMOND.

38 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Henry C. Whitney, being first duly sworn, saith on oath that he delivered a true copy of the annexed citation to Joseph O. Glover, esq., attorney of record for the defendant in error in the cause therein mentioned, this 16th day of August, A. D. 1873.

HENRY C. WHITNEY.

Subscribed in my presence, & sworn to this 16th day of August, A. D. 1873.

FRED. W. COLE,
U. S. Com.

(Indorsed:) Herman J. Pahlman et al. vs. Herman Raster. Citation. Scates & Whitney, att'ys for pl'ff.

39 Supreme Court of the United States.

HERMAN J. PAHLMAN ET AL., PLAINTIFFS IN error,
vs.
HERMAN RASTER, DEFENDANT IN ERROR.

Error to circuit court for northern district of Illinois, of the October term, A. D. 1873.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Herman J. Pahlman, David G. Rush, and Charles Welsh, by Walter B. Scates, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: that the court below sustained the demurrer of the defendants in error to the declaration of the plaintiffs in error, and rendered judgment upon the demurrer and against the plaintiffs in error.

And the said Herman J. Pahlman, David G. Rush, and Charles Welsh pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

WALTER B. SCATES,
Attorney for Plaintiff in Error.

(Indorsed:) Supreme Court of the United States. Herman J. Pahlman et als., pl'ffs in error, vs. Herman Raster, def't in error. Assignment of error. Walter B. Scates, pl'ffs' att'y.

(Indorsement on cover:) No. 566. Herman J. Pahlman, David G. Rush, & Charles Welsh, plaintiffs in error, vs. Herman Raster. N. Illinois C. C. U. S. Filed 16 October, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 566.

OCTOBER TERM, 1873.

HERMAN J. PAHLMAN ET AL., PLAINTIFFS IN ERROR,

vs.

HERMAN RASTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Whereas it was by the counsel for each of the above-named parties at the trial in the court below stipulated & agreed that the common counts in the plaintiffs' narrative in said suit should be stricken out and the cause submitted to the court upon the special counts in said narrative, and a general demurrer thereto; and whereas it appeareth that said stipulation by some means is not included in the record in said cause:

Therefore, it is now agreed that said common counts be now stricken out of the record, and the cause heard in the said Supreme Court upon the special counts and the demurrer as if there were no common counts in said narrative.

SCATES & WHITNEY,
Att'ys for Pl'ffs.

J. O. GLOVER,
Def't's Att'y.

S. F. PHILLIPS,
Solicitor-General.

2 Supreme Court of the United States. No. 566. October term, 1873.

HERMAN J. PAHLMAN ET AL., PL'FFS IN ERROR,
vs.
HERMAN RASTER.

On consideration of the stipulation of counsel for the respective parties, and on motion of Mr. Solicitor-General Phillips, it is now here ordered by the court that the record in this cause be amended by striking out the common counts in the plaintiffs' narrative, and that the cause be heard upon the special counts and the demurrer.

27th March, 1874.

SUPREME COURT,

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

HERMAN J. PAHLMAN, ET. ALS.,
Plaiutiffs' in Error,

No. 5666 *vs.*

HERMAN RASTER,
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Illinois

BREIF AND POINTS OF PLAINTIFFS' IN ERROR.

SCATES & WHITNEY,
Attorneys for Plaintiffs' in Error.

CHICAGO:
GILCHRIST & SMITH, PRINTERS, 143 MONROE ST.
1873.

No. 566.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

HERMAN J. PAHLMAN, DAVID G. RUSH AND CHARLES WELCH,
Plaintiffs in Error.

vs.

HERMAN RASTER,
Defendant in Error.

Error to the Circuit Court for the Northern District of Illinois.

OUTLINE OF THE CASE.

I.

The plaintiffs, doing business as distillers in Chicago, in the first Congressional District of Illinois by the name and style of H. J. Pahlman & Co., filed their declaration in assumpsit in the Circuit Court of Cook county, Illinois, against the defendant as Collector of Internal Revenue in said district, for the recovery of certain sums of money illegally assessed upon them as such distillers, and col-

lected of them, under protest, by defendant.

The declaration contains two special counts and the common money counts, to all of which a general demurrer was filed.

On petition of defendant the cause was removed from the Circuit Court of Cook county to the Circuit Court of the United States for the Northern District of Illinois.

On hearing argument upon the demurrer to the declaration, the Circuit Court sustained the demurrer and rendered judgment for costs against the plaintiffs; and they now prosecute a writ of error on the judgment, out of this court.

The only question now presented in this court is upon the sufficiency of the plaintiff' declaration to entitle them to a recovery.

II.

In the first special count in the declaration it is set forth, charged and averred (MS. Record, pp. 12 to 21):

That plaintiffs, as such partners, designing to enter into the business of distillation of alcohol from grain in the city of Chicago, in the first Congressional District of Illinois, did, on or about the 1st day of August, 1870, give to the assessor of Internal Revenue for that district a notice, as provided and required in the 6th section of an act entitled, "An Act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July 20th,

1868, wherein said plaintiffs, among other things, as required by law, and the regulations of the Commissioner of Internal Revenue, also gave notice that they would ferment each tub of mash or beer used by them in the manufacture of alcohol, as aforesaid, for the period of seventy-two hours; that on or about the said time last mentioned said plaintiffs did execute a bond as such distillers as required by the 7th section of said act of Congress, and did comply with the provisions of said act of Congress in all other respects, and with the regulations of the Commissioner of Internal Revenue. And said plaintiffs did then and there enter upon the business of distilling alcohol from grain, and continued to do so until the 1st day of September, 1871, and did continue to give like notice from year to year, and to renew their bond as such distillers, and in said notice, among other things, that they would continue to ferment each tub of mash or beer for seventy-two hours; and did, in all other respects, comply with the provisions of the said act of Congress and with the regulations of the Commissioner of Internal Revenue thereunder. And said plaintiffs did, during all the time aforesaid, continue to manufacture alcohol by distillation from grain as aforesaid, and during all the time aforesaid did continue to ferment each tub of mash or beer for the space of seventy-two hours, in accordance with said notice. (MS. Record, pp. 12 to 21).

That on or about the 1st day of January, 1871, defendant, was appointed and entered upon the duties of the office of Collector of Internal Revenue of the United

States for said first Congressional District of Illinois, and so continued to be, and to act and perform the duties of such collector from thence until the 1st day of October, 1871; and said,

Defendant, as such collector, did then and there, during all of said period of time, demand and collect of and from said plaintiffs, as such distillers, from month to month, during the term of time aforesaid, certain sums of money, as and for the per diem capacity tax of said plaintiffs, distillers, under the said act of Congress of July 20th, 1868—that is to say (MS. Record, 12 to 21):

For	24	distilling	days	in	February,	1871,	the	sum	of	$1,632	on	16,320 bushels.
"	27	"	"	"	March,	"		"		$1,836	"	18,360 "
"	25	"	"	"	April,	"		"		$1,700	"	17,000 "
"	27	"	"	"	May,	"		"		$1,836	"	18,360 "
"	26	"	"	"	June,	"		"		$1,768	"	17,680 "
"	16	"	"	"	July,	"		"		$1,088	"	10,880 "

And said plaintiffs aver, and in fact say, that the said several monthly sums thus collected were predicated upon the producing capacity of said distillery upon the basis of a fermenting period of forty-eight hours;

Said plaintiffs further aver that the commissioner of Internal Revenue, did, previous to the making of the survey of said plaintiff's distillery, for the purpose of making the assessment upon which the above collections were predicated, order and instruct the assessor of Internal Revenue for the said 1st congressional district of Illinois, to make the assessment upon a basis of a fermenting period of forty-eight hours, the same being according to the survey.

Said plaintiffs further aver, that in truth and in fact, the

actual fermenting period used by said plaintiffs, during the months aforesaid, was seventy-two hours, in strict accordance with the notice given by them as herein before set forth.

Said plaintiffs further aver and say, that the true per diem capacity of the plaintiffs' distillery was as follows, that is to say: (M. S. Record, pp. 12 to 21.)

For the month of	February,	1871—	12,000	bushels—	and the	per diem tax,			$1,200.
"	"	" March,	"	—13,500	"	— "	"	"	$1,350.
"	"	" April,	"	—12,500	"	— "	"	"	$1,250.
"	"	" May,	"	—13,500	"	— "	"	"	$1,350.
"	"	" June,	"	—13,000	"	— "	"	"	$1,300.
"	"	" July,	"	— 8,000	"	— "	"	"	$0,800.

Said plaintiffs further aver and say, that defendant as such collector asked, demanded and received of and from said plaintiffs as such distillers, as aforesaid, as and for the per diem capacity tax of said distillery;

For the month of	February,	1871,	the sum of	$432,	on	4,320	bushels,	both	in excess.
"	"	" March,	"	"	"	$486,	on	4,860	"	"	"
"	"	" April,	"	"	"	$450,	on	4,500	"	"	"
"	"	" May,	"	"	"	$486,	on	4,860	"	"	"
"	"	" June,	"	"	"	$468,	on	4,680	"	"	"
"	"	" July,	"	"	"	$288,	on	2,880	"	"	"

and each for the respective months above, being respectively in excess of the true per diem capacity of said distillery for those respective months, making an aggregate amount in excess of the true per diem capacity of said distillery for the months aforesaid, of two thousand six hundred and ten dollars, ($2,610.) and of twenty-six thousand one hundred bushels of grain. (26,100 bushels.)

And said plaintiffs further aver, charge and say, that

said defendant, then and there, at the said several times aforesaid, forced and compelled said plaintiffs to pay, and said plaintiffs did then and there in fact pay the said several sums of money under protest. (M. S. Record, pp. 12 to 21.)

Plaintiffs further aver that after these several sums were so collected of them by defendant, they did appeal to the commissioner of Internal Revenue in due manner and form according to the provisions of the Revenue laws and regulations for a refunding and repayment of said several sums so collected by defendants in excess of the daily per diem capacity tax on said distillery, stating the reasons and grounds therefor fully and at large, and which said appeal and claim for a refund were overruled and disallowed by said commissioner; and this suit was commenced within six months after the said disallowance by said commissioner, and the notification thereof to plaintiffs by the then acting collector of said first congressional district of Illinois.

By means whereof defendant then and there became liable to pay to plaintiffs said several sums of money so illegally exacted and collected from them, and being so liable afterwards on the 1st day of October, 1871, undertook and promised to pay them on request. (M. S. Record, pp. 12 to 21.)

The second special count sets forth substantially the same facts, and makes the same averments, charges and

allegations, in a more general form. [M. S. Record, 2 pp. 22 to 26.]

The third count is a general indebitatus for $5,000, moneys paid, laid out and expended, in the usual form. [M. S. Record, 3, pp. 26, 27.]

The fourth count is the same for $5,000 for moneys had and received. [M. S. Record, 4, p. 27.]

The fifth count is the same for $5,000, moneys due and payable, interest due, etc., and all concluding with the usual request and refusal and breaches, damages $5,000. [M. S. Record, 5, pp. 27, 28.]

General demurrer to the declaration, sustained and judgment against plaintiffs for costs.

Thus it will be seen that the declaration contains averments of every fact, and the compliance by plaintiffs with all the provisions of the act of congress of July 20th, 1868, and the regulations of the commissioner thereunder, that a survey and assessments were made under said regulations, the taxes paid under protest, and an appeal for refunding made [under section 19, act of July 13th, 1866, and amended by act of March 2nd, 1867, [Bump. p. 91,] and disallowed, and this suit brought within six months thereafter.

The demurrer admits all the facts and allegations upon this legal issue. I present the following points for the consideration of the court, as to the conclusions of the law upon the admitted facts.

III.

One object of the act of 20th July, 1868, was the levy and collection of specified taxes upon the manufacture of spririt or alcohol from grain, as one of the industries of the country, modifying existing acts upon that subject. And my object in this brief is to ascertain and present the true intent and meaning of the legislature in the provisions enacted for the above object. A short review and analysis of some of these provisions may assist in arriving at correct conclusions upon the provisions immediately involved:

Section 4 defines *distilled* spirits (Bump, Int. Rev. Law, p. 133), and declares that a tax shall attach to it as soon as it is in existence.

Section 1 imposes a tax upon every gallon of distilled spirits. (Bump, p. 124).

Section 13 imposes a per diem capacity tax of $2.00 for every twenty bushels the distillery is capable of mashing and fermenting every twenty-four hours. (Bump, p. 152).

Section 20 provides that every distillery shall account for all the spirits distilled, and for eighty per cent. at least of the aggregate amount of its capacity. (Bump, p. 161).

By section 59 two special taxes are levied: 1st, on distilleries producing one hundred barrels or less, annually, a tax of $400. 2d, on distilleries produciug more than one hundred barrels per annum, a tax of $4.00 per barrel. (Bump, p. 214).

All other provisions of the act in respect to distilleries are but details for the assessment and collection of the foregoing taxes.

I therefore submit this proposition as law, under the provision of the 6th section:

In estimating the per diem capacity tax levied under section 13 (Bump, p. 152), the assessor is controlled and governed in his calculation of the aggregate capacity for mashing and fermenting, by the notice given by the distiller under section 6 (Bump, p. 135), and must base his calculation upon the period of fermentation fixed in said notice. And the assessor and his skilled assistant, in making a survey of the capacity of the distillery, under the provisions of section 10 (Bump, p. 144), have no right, power or authority to adopt any other period of fermentation than that fixed by the distiller in his notice given under section 6. Both the distiller and the government are bound by it.

I further add that the following regulations under said act, issued by the Commissioner of Internal Revenue in his circular letter to assessors and surveyors of distilleries, dated, April 8, 1870, were not authorized, under section 103 of said act (Bump, p. 261), and are therefore null and void, to wit: "The true producing capacity of a distillery is not limited to what the distiller may produce by following a particular course which he has marked out, but what may be produced under favorable circumstances."

"The true producing capacity of a distillery is not the

amount so proposed to be produced, but the amount which can be produced, using all the machinery and apparatus under competent and skillful management, taking as a basis for the calculation such premises as will produce the best practical results."

* * * * * *

"Having found the number of bushels which are required to fill the fermenters, the assessor and person designated to aid him will determine what, under all the circumstances, is a reasonable period to be allowed for fermenting, and in so doing they are not bound by the period stated in the distiller's notice, but are to take such period as will, under ordinary circumstances, and with good management, produce the best results. From the best information, it is believed that a fermenting period of sixty hours is as long a period as can be used consistently with good management or a profitable conduct of the business, and where a greater period than this is assumed, it must be accompanied with such a statement of the circumstances as will show it to be justified as an exceptional case." [Bump, p. 144].

"The surveyor, having ascertained by the measurement the cubic contents of the fermenting tubs, finds it necessary to determine": * * "2d, the period necessary to enable the distiller to ferment each tub of mash."

* * * * *

"These are questions coming within the discretion and judgment of the assessor and his skillful assistant, with

which the office of Internal Revenue has no disposition to interfere. But it has been thought proper for the guidance of the surveyor to *prescribe certain rules on these points*. Surveyors are, therefore, to be governed by the following rules in fixing the capacity of a distillery, except where they find that they do not correctly determine its capacity." * * "Forty-eight hours is *prescribed* as the *maximum period to be allowed for fermentation* in sweet mash distilleries." [Bump, p. 147.]

* * * * * *

"The capacity to be determined is not the capacity to make this or that particular brand of distilled spirits, but the capacity to make *distilled spirits* as prescribed in section 4, act of July 20th, 1868."

"Distillers sometimes insist that they cannot produce a particular brand or kind of spirits which they are in the habit of manufacturing without using a longer fermenting period than is *allowed* by *these rules*. Section six of said act affords the distiller ample opportunity to take any period he may desire by specifying such period in his form 27; but as taxation is based upon *capacity to produce spirits*, as described in section 4, and not to produce this or that particular brand; and as the spirit described in section 4 is successfully produced within the period named, *surveys are, therefore, made accordingly*, and the taxation is thereby rendered uniform." (Bump, p. 148.)

It will thus be seen from the extracts above of the commissioner's regulations, that he not only treats the 6th

section, and notice under it, as a nullity, claiming the right to fix upon any fermenting period he thinks proper; but he also claims the right to make such a survey as to the capacity, as to compel distillers to use the largest number of bushels daily that can be demanded by a short fermenting period, and to add to that per diem tax the gallon tax on the same bushels, at the rate or average of three and one half gallons per bushel, while he prevents that length of fermentation which distillers find in their experience necessary to obtain all the alcohol from the grain.

It will be further seen that under such an interpretation or construction of these provisions of the act, distillers are compelled to pay tax on more gallons than can be extracted from the grain upon such imperfect fermentation, and consequently pay for more grain than would be needed to make the same quality of spirits if allowed time for perfect fermentation.

The object of the legislature was to raise revenue on this class of manufactures, not to cripple or destroy them; neither was it to compel distillers, as assumed in the above regulations, to carry on their business in a manner to produce the largest amount of taxable products without regard to their own private interests.

That the notice in section 6, was intended to give the distiller the right to contract and fix his own period of fermentation, and that the government is also bound by it, is not only shown by the language of the act, if that section is to have any reciprocal obligation at all, but it is

conclusively shown to be the true intent and meaning of the legislature, by the debates upon that section, while under consideration in the committee of the whole.

In the Congressional Globe, second session, fortieth congress, part four, page 3414, the court will find the following remarks:

"Mr. Beck: I move to strike out the word "will" in "line 20, and insert in lieu the words, 'usually takes to,' "so that it will read, "the number of hours in which the "distiller usually takes to ferment each tub of mash or "beer."

"It is impossible to tell how long it will take to ferment. "I know it varies in my district from three days and a half "to five days—depending upon the weather and other "causes. You should not *punish* a man who cannot *help* "himself. He should not be *held responsible* for the failure "to ferment within the time when the 'weather or a thous- "and other circumstances may prevent the fermentation.'"

* * * * * *

"Mr. Schenck: When I first read the form of expres- "sion contained in other legislation, it struck me some- "what in the same way." We called a *council* of *distillers* "on the subject, and found that *this* was just the *language* "*they used.* They have twenty-four hour, forty-eight "hour and seventy-two hour, beer. Although there may "be a little difference occasioned by the temperature, they "classify their beer in that way, and *every distiller will* "*tell*, in regard to a partrcular kind of beer, what time

"he *wants for his mode of distillation, so that the bill is, in* "*fact, drawn in conformity with the notions of the dis-* "*tillers themselves: The amendment would make it very* "*vague even as to the rules of the distillers themselves.*"

"Mr. Beck: They should not be *punished* for *failing* "to do what is *inevitable*. The time varies in extreme "cold or in extreme warm weather. A thunder storm will "so effect it that it will not ferment in a very long time. "If the committee, however, *think* that the word "*will*" "*leaves margin enough*, I will not press the amendment."

"Mr. Allison: I think it does."

"Mr. Schenck: Permit me to say that our *object* is to "*charge* upon the *capacity*, among other things, and if we "leave an *uncertainty* about *this*, we run the *risk* of not "getting the *capacity taxed. The distillers themselves have* "*their rule on the subject, and whatever time it takes to* "*ferment, they designate* their beer accordingly as twenty- "four, forty-eight, or seventy-two hour beer."

"Mr. Beck: I *withdraw* the amendment. I only de- "sired to call attention to the subject."

See also Mr. Mungen's remarks on the per diem capacity taxed, *id.*, p. 3445.

It is thus seen that the wording of section 6, in inserting the word "will," and retaining it on debate, was intended by the chairman of the committee which ordered it, and that, too, after conference with distillers, to give

distillers the right to fix and control the period of fermentation, each for himself, and that, too, with reference to the per diem tax. And upon debate the word was retained, because it expressed, and would secure that right to distillers,

It will be further seen that the instructions of the commissioner are not such regulations as are authorized by section 103 of the act (Bump, p. 271), but are in the nature of legislative provisions interpolated into the law, and the demurrer admits that the assessment made under them is in excess of the true per diem capacity.

In further confirmation of the true intent and meaning of section 6 being, as I now contend for it, I call the attention of the court to the contemporaneous construction of it by the Commissioner of Internal Revenue himself. The first circular of regulations to assessors under that act was dated and issued on the 3d day of August, 1868.

The second circular was issued on April 22d, 1869, and surveys were made under those instructions in conformity with the fermenting period as fixed by the distillers' notices, and taxes assessed and collected accordingly on the per diem capacity, until the issue on the 22d day of April, 1870, of the new regulations, from which the above extracts are taken.

The regulations of the 3d day of August, 1868, contained these instructions on the subject:

"SURVEY."

"The survey required by section 10, is to be made of

every distillery registered or intended to be registered, for the production of spirits, and of every still or distillery apparatus hereafter set up. The object is to determine the true producing capacity of each distillery, i. e., the quantity of spirits which may be produced in such distillery in twenty-four hours. This will, of course, depend upon the power to be used; the capacity of the still or stills; the mashing and fermenting capacity, and *the fermenting period.* In addition to this the report should state the aggregate mashing and fermenting capacity in bushels or gallons, i. e., the number of bushels of grain or gallons of molasses which may be mashed and fermented in twenty-four hours, as this is one of the tests by which the amount of tax due is to be determined, it should be carefully and correctly made." * * * *

The regulations of the commissioner, of date April 22d, 1869, provides as follows: * * "Having found the aggregate mashing capacity of the fermenters, they will divide this amount by the number of gallons of mash which the distiller makes from a bushel of grain, [not exceeding, however, forty-five gallons of mash to the bushel of grain in any case,] which will give the number of bushels that will be required to fill the fermenter. Then taking the fermenting period as fixed by the distiller on form No. 27, or the average fermenting period actually used by the distiller as ascertained by the assessor, and the person designated to aid him, from the best evidence accessible to them, which must be a fixed and definite number of hours or days, adding thereto twenty-four hours or one day for

the time each fermenter is required to remain empty after its contents are drawn off, and dividing the number of bushels by this sum, the result will be the number of bushels which can be fermented in twenty-four hours. If not even days, divide by the number of parts and multiply by twenty-four."

* * * * * *

"Again, suppose the distiller's fermenting period is fixed at seventy-two hours. adding the twenty-four hours during which each tub must remain empty, no one of the tubs can be filled oftener than once in four days. If the assessor finds that the distiller *actually* ferments but forty-eight hours, he must necessarily use more material than could have been used with seventy-two hours' fermentation, and, of course, must have produced more spirits."

The importance of these computations as a means of testing the correctness of the returns of the distiller can be readily seen, and they all contain elements material to be considered in the determination of the question what is the quantity of spirits which has been actually produced by the distiller during the month."

IV.

This question has never been presented in any case heretofore, nor decided by this court; this being a question on per diem capacity, and where the survey is admitted to be false by the demurrer.

The case of Stevenson vs. Beggs, decided at last term

of this court was on a question of the eighty per cent. deficiency tax, and in which no question was raised as to the correctness of the survey. The same in the case of U. S. vs. Singer, decided at the last term; the question there was also in reference to the eighty per cent. deficiency of tax without any question as to the correctness of the survey, in both of which cases, the surveys were made upon the basis of the distiller's own fermenting period, and I refer to the reports in those cases for the dates in which those questions arose.

WALTER B. SCATES,

Attorney and Counsel for Plaintiffs in Error.

No. .....AGENDA NO.....

Supreme Court,

OF THE UNITED STATES,

October Term, A. D. 1873.

HERMAN J. PAHLMAN, ET. ALS.,
Plaintiffs' in Error.

VS.

HERMAN RASTER.
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Illinois.

BREIF AND POINTS OF PLAINTIFFS' IN ERROR.

FILED.....1873.

.....*Clerk.*

SCATES & WHITNEY,
Attorneys for Plaintiffs' Error.

Gilchrist & Smith, Printers and Publishers, 143 & 145 Monroe Street, Chicago.

SUPREME COURT,

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

HERMAN J. PAHLMAN, ET. ALS.,
Plaintiffs' in Error,

No. 566

vs.

HERMAN RASTER,
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Illinois

ARGUMENT OF PLAINTIFFS' IN ERROR.

SCATES & WHITNEY,
Attorneys for Plaintiffs' in Error.

CHICAGO:
GILCHRIST & SMITH, PRINTERS, 143 MONROE ST.
1873.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1873.

HERMAN J. PAHLMAN, ET. AL.
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vs.

HERMAN RASTER,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT OF PLAINTIFFS IN ERROR.

By section 13 of act of July 20th, 1868, (Bumps Int. Rev. Laws, p. 152,) it is provided that every distiller "whose distillery has an aggregate capacity for *mashing* "*and fermenting* twenty bushels of grain or less per day, shall pay a tax of two dollars per day; and a further tax of two dollars per day for every additional twenty bushels of "capacity" to thus *mash and ferment grain.*

By section 10 of same act (Bumps Int. Rev. Laws, p. 144,) it is provided, that each assessor and a skilled assistant to be designated by the commissioner of Internal Revenue shall make a survey of every distillery in his district

in order "to estimate and determine its true producing capacity."

By section 6 of same act (Bumps Int. Revenue Laws, p. 135,) it is provided, among other things, that the distiller shall give notice of the number and contents of his fermenting tubs; and likewise of "*the number of hours in which he will ferment each tub of mash or beer.*"

The method whereby the assessor and his assistant should determine the true producing capacity of a distillery is officially stated by the commissioner of Internal Revenue in his instructions of April 22nd 1869, to be; to first ascertain the number of bushels of grain needed to fill the fermenting tubs; "then, *taking the fermenting* "*period as fixed by the distiller or the average fermenting* "*period actually used,* * * * which must be a fixed "and definite number of hours or days, adding thereto "twenty-four hours for the time each tub is required to "stand empty, ,' etc., "and dividing the number of bushels "by this sum, the result will be the number of bushels which can be fermented in twenty-four hours; and in fact *no* other method could have been adopted in regard to the fermenting period.

Had this method been pursued in this case there would have been no basis for this suit.

But notwithstanding that this very method had been pursued from the commencement, and antecedent to those instructions as well as afterwards, the commissioner issues

other instructions in the year 1870, wherein he instructed all assessors to disregard, for purposes of determining the capacity, the fermenting period stated by the distiller in his notice, and actually used by him, and to *assume* a fermenting period of forty-eight hours in all cases, which instructions the assessors obeyed, in falsification of the facts as they existed.

By this mode of assessment, the whole amount of grain which the distillery will contain, is divided by "three"—the two days allowed for fermenting, and the one day during which the tubs are required to stand empty; the true mode of assessment in this case should be, to divide the total amount of grain by "four"—the three days actually employed as a fermenting period, and the one day that the tubs are required to remain empty under the law.

The excess over the true tax assessed by this arbitrary and false method amounts to about one-fourth of the whole, and complaint herein is made of the *excess* of the tax collected; not of the tax warranted by, and actually due under the law, nor of the law itself in any particular.

Right to be taxed upon the actual capacity for mashing and fermenting grain is conceded; authority to tax upon an ideal, potential or constructive capacity is denied.

Determination of "capacity" is provided for by the 6th and 10th sections of act of July 20th, 1868, before referred to; and determination and establishment of fermenting period, which is one of the vital elements of "capacity,"

is provided for by an elaborate, well defined and clearly expressed method in section 6, of said act of July 20th, 1868.

Authority of commissioner to prescribe a different fermenting period from the period actually employed, is claimed to consist in power conferred on commissioner by section 103, act of July 20th, 1868; (Bumps Int. Rev. Laws, p. 261,) but this authority only allows the commissioner to make "necessary regulations" which are "*not otherwise provided for*," and to establish the "mode or time of assessment or collection" where the same is "*not provided for.*"

Plaintiffs in error maintain, that the general authority conferred by this section cannot apply to the establishment of a fermenting period, inasmuch as the fullest provision is made therefor, by the law; and consequently that the commissioner has no right, even to order the distiller to adopt a fermenting period to suit him, the commissioner; much less to collect from the distiller a tax as if he had adopted a fermenting period such as the commissioner desired but which the law gave him no power to force the distiller to adopt.

By section 6, act of July 20th, 1868, the distiller is himself compelled to choose and put upon record under severe penalties, a fermenting period, and to abide same under penalty of imprisonment; hence, fermenting period is fully *provided for*, and section 103 cannot apply.

Commissioner admits that distiller must establish his

fermenting period for use, and must abide same (see instructions of commissioner, Bumps Internal Revenue Laws, p. 146,) but he arbitrarily chooses to establish another and a different fermentation period for purpose of taxation ; and thus we have presented the anomaly of two fermenting periods ; one, the actual and legal fermenting period established by the mode laid down by the law, and in use by the distiller ; the other, an imaginary fermenting period, having no real existence, and no office or function, save to afford a show of justification or formal excuse for collecting an amount of tax not authorized by law and having no basis to rest upon.

The " capacity " contemplated by the law is not an ideal, imaginary or speculative " capacity ; " but is the practical capacity of each distillery for itself, determined by a system defined in the law with great minuteness and particularity, and in which the fermenting period constitutes a chief element ; and unless the fermenting period chosen by the distiller by compulsion of law—put upon record by the same compulsion and likewise enforced by compulsion, is for the purpose of establishing this " capacity ; " its incorporation into the law is senseless and inexplicable.

It is a well understood rule, in construing a statute, that effect must be given where practicable to every part of it.

Now if the views of the defendant are to prevail here, what effect can be given to that part of section 6, relating to the establishment by the distiller of his fermenting period ? Why establish a fermenting period at all by the

law? and, especially, why not, by express law, invest the commissioner with power to establish the fermenting period? Of what possible utility is the elaborate provision in section 6, relating to the establishment of a fermenting period? Did the law-makers have no reasonable objects in view when they made this provision? Does the law anywhere allow the commissioner to nullify their express enactment? The law everywhere else, seems to possess utility and to have a clearly defined object; here there is neither if the construction contended for by defendant is to prevail.

This tax is based upon the "aggregate capacity" of each distillery "for mashing and fermenting" grain; clearly meaning, the capacity as it exists, or, in other words, upon what the capacity *is*; the commissioner, however, orders an assessment upon a capacity which he speculates is possible to be obtained, which, in his opinion, *should be* realized; hence he treats the law and the action of the distiller thereunder as a nulity, so far as taxation of capacity is concerned. That this severely practical revenue law imposes a tax upon the commissioner's naked opinion of what each distillery might, could, would or should produce, is impossible to believe: and equally impossible is it to believe, that the law establishes by an elaborate system a fermenting period for actual use, and then allows the commissioner by the authority contained in section 103 to establish an arbitrary fermenting period for purpose of taxation; and we may add, that if the sole will of the commissioner, with no responsibility and no appeal, is to be

sustained in this action, he might quite as easily fix twenty-four hours as the fermenting period for purposes of taxation, and by so doing, inevitably bankrupt every distillery in the nation, within ninety days; as congress has conferred upon him no such dangerous and irresponsible power, it is not probable that this court will invest him with it, or acquiesce in his assumption of it.

The tax in question is based upon capacity of a distillery to consume grain; and this capacity rests upon two several predicates, viz:

1. Number and dimensions of fermenting tubs.

2. Length of fermenting period.

Over both of these subject the distiller has entire supremacy; he must from necessity choose and establish the number and dimensions of his tubs; and he must by the law, himself, choose his fermenting period. When he has thus chosen, established and put upon record, his ferment ing period, the consuming capacity of his distillery is fixed, and authority to tax THIS capacity (but not some *other* capacity) is given by section 13 aforesaid.

The effect of this arbitrary and unauthorized action of the commissioner is to *truly* assess such distillers as do conform to his established fermenting period, and to impose a penalty upon such as do not do so; thus the distiller at Chicago who ferments seventy-two hours, (such being the period demanded by the climate) pays twenty-five per cent. more capacity tax than the Cincinnati dis-

tiller who ferments forty-eight hours (such being the period which the climate there demands) or in other words, the Chicago distiller is fined, so to speak, that amount by the commissioner for not arresting fermentation twenty-four hours before practice and the climatic laws attest that the process is complete ; this is the legal and practical effect of the commissioner's order prescribing an uniform fermenting period.

Let it not be forgotton that no *adequate* cause is given for the interference of the executive branch of the government with the subject of the fermenting period, so amply defined and provided for in the law ; commissioner's action is not pretended to be written in the law, or to be necessary for the prevention of frauds ; if any reason be furnished at all, it may be found in the following extract from the commissioner's instructions, viz : "Distillers some-
" times insist that they cannot produce the particular kind
" or brand of spirits which they are in the habit of manu-
" facturing without using a longer fermenting period than
" is allowed by these rules. Section 6 of said act affords
" the distiller ample opportunity to take any period he
" may desire by specifying such period in his Form 27, but
" as taxation is based upon capacity to produce spirits as
" described in section 4, and not to produce this or that
" particular brand ; and as the spirit described in section 4,
" is successfully produced within the period named, surveys
" are therefore made accordingly, and the taxation is
" thereby rendered uniform." (Bumps Internal Revenue Laws p. 148.)

We expressly deny the assumption that distillers need a "longer fermenting period" in order to produce a particular brand; they claim no such thing; they need a "longer fermenting period" in order to produce alcohol at all or to obtain from the grain all the spirit in it; in Cincinnati and other warmer latitudes and climates, forty-eight hours may suffice: in Chicago, not less than seventy-two hours will answer, and is absolutely indispensable to ferment the grain and produce alcohol; and this need not rest on anybody's *ipse dixit*, but may be tested by the fact that every distiller at Chicago took seventy-two hours for fermentation, notwithstanding that they were obliged to *pay* for forty-eight hours fermenting period.

We also deny the assumption that this per diem tax (and which is the only tax under consideration now,) is "based upon capacity to produce spirits." The law itself, says, (section 13, act of July 20th, 1868, Bumps Internal Revenue Laws p. 152,) that this tax is based upon "an "aggregate capacity for mashing and fermenting" * * "grain." The question, therefore, which is here presented is, how long does it take to *ferment grain?* Now in this case the *notice* says seventy-two hours; this was the experience of distillers here; and also the notices and experience of all the distillers in this latitude confirms it.

Nor does the Commissioner, in anywise dispute it; indeed he does not attack the fermenting period at all, but he merely says the kind of spirits described in Sec. 4, may

be produced in forty-eight hours: this assumption we likewise deny, and in verification thereof, we refer to the experience of every distiller in the latitude of Chicago, all of whom have adopted, and actually ferment, seventy-two hours.

But even if *some* spirit might be produced in forty-eight hours, it does not follow that the grain could be mashed and *fermented* fully and properly within that time: we have manifestly a right not only to produce some spirit, but to entirely *ferment* the grain so as to get out all of the spirit there is in it.

When this question was being considered in the lower house of Congress, the following remarks were made which will serve to illustrate, somewhat, this matter of a fermenting period: Mr. Beck of Ky., moved to amend the notice of the distiller as to fermenting period so that the distiller should give notice, not of the period that he "will" ferment, but "of the number of hours in which "the distiller usually takes to ferment, &c.," and he said, (Cong. Globe, 2d Sess., 40 Cong., part 4, p. 3414:) "It is "impossible to tell how long it will take to ferment. I "know it varies in my district (Lexington, Ky.,) from "three and a half to five days, depending upon the "weather and other causes." * * "He should not be "held responsible for the failure to ferment within the "time, when the weather or a thousand other contingen-"cies may prevent the fermentation." Mr. Schenck: "When I first read the form of expression contained in "other legislation, it struck me somewhat in the same

"way. We called a council of distillers on the subject "and found that this was just the language they used." * * "The bill is, in fact, drawn in conformity with the notions "of the distillers themselves." * * Mr. Beck: * * "The time varies in extreme cold or in extreme warm "weather. A thunder storm will sometimes so affect it "that it will not ferment in a very long time." * * * Mr. Schenck: "Permit me to say that our object is to "charge upon the capacity among other things and if "*we leave an uncertainty about this*, we run the risk of "not getting the capacity taxed. *The distillers themselves* "*have their own rule on the subject*, and whatever time it "takes to ferment, they designate their beer accordingly," &c.

At a later stage in the maturity of the law, a member (Mr. Mungen,) objected to the entire capacity tax, in the course of which he said, (Cong. Globe, 2d Sess. 40th Cong.. part 4, p. 3445:) "Another objection, and a very serious "one, is the length of time the distiller claims for fer- "mentation. Before the tax, it averaged four to "five days, and there are many who allow their beer to "ferment that length of time now, while others run "seventy-two, fifty, forty-eight and even twenty-four hour "beer. How is this to be determined? On what basis "are you to make your estimates? Whatever else about "distillation can be regulated and controlled by legisla- "tion, this is one that cannot be fixed, or any uniform "rule established. Natural forces are at work which

"depend upon a thousand conditions not possible for "man to control."

Professor Muspratt in his standard work on Chemistry, says, (vol. 1, p. 64:) "Fermentation is the most impor- "tant stage through which the material in the hands of "the distiller has to pass, and one which not only "demands considerable skill and attention for its proper "management, but also requires extensive knowledge, "both of the principles of chemistry and of practical "results. Indeed the success of the operation almost "entirely depends on the fermentation of the wort, and "unless governed with due care and dexterity, a failure "will be the consequence." * * "The proper fermen- "tation of worts oftentimes baffles the most skillful, the "process being so changable in its nature."

Also "the time occupied by fermentation varies, "extending over a period of between three and six "days, and in some occasions, seven or nine days. Dif- "ference of season has a great influence on the celerity "or slowness of the fermentation. (ib. 65.)

In view of all the above testimony, it would seem that the commissioner was not well advised when he supposed, either that an uniform fermenting period was possible to be attained; or that fermentation could take place in the latitude of Chicago in forty-eight hours; or that congress intended to, or did in fact, do more, when they provided for the distiller's notice, than to compel the distiller to select, and abide by, a limited fermenting period; or that

congress designed to, or did in fact leave any uncertainty in the law about the fermenting period.

It may, however, be claimed upon the authority of a dictum in case of Stevenson vs. Beggs, decided by this court at its last term, that the survey made in this case is conclusive; and that as the survey adopted forty-eight hours it is conclusive by the authority cited; to this we reply, that by the demurrer, it is admitted that the fermenting period used *was* seventy-two hours; and that the survey was consequently false; a survey can only be *conclusive* upon the assumption that it is true;—when it is admittedly *false*, it ceases to be conclusive, or to have any other force or virtue; moreover a *survey* can only by its very nomenclature, inspect and report facts as they exist; it ceases to be a *survey* if it professes to see and report facts which do *not* exist; if a fermenting period of forty-eight hours was actually being used, the survey should so state despite the notice; but having found a fermenting period of seventy-two hours, it could not be *surveyed* otherwise; and a court would not, certainly, so far stultify itself as to treat a *survey* as conclusive, or as being worthy of its consideration at all, which is admittedly *false by the record.*

If this court cannot reach the admitted truth even though it be hidden behind the form of survey, then the assessor and his skilled assistant are invested with power to totally disregard the facts as they may exist, and to make a report of a survey which is totally false and ruinous to the distiller; and there is no remedy except for the

commissioner to order the same assessor and assistant to make a new survey, (section 10, act of July 20th 1868,) which is no remedy at all unless the first survey was an error merely ; in this view of the case, if the survey is conclusive, though false, it is conclusive on the commissioner as well as on the court and an appeal to him would be fruitless in every case of a false survey.

All that the authority in question can be construed to mean is, that the survey is conclusive as against the distiller's report ; and not that it is conclusive against the truth ; as well might the testimony of a witness who should, at the close of his examination, swear that he had throughout testified falsely, be received as valid proof: and in pressing this argument, we claim a right to go behind the survey because the defendant admits on the record that it is false as to plaintiff's actual period of fermentation.

The case of " Stevenson vs. Beggs " just referred to, is relied on as *authority* to sustain the commissioner in his ordering of a fictitious fermenting period.

We consider it as wholly inapplicable ; as we read that decision, it decides as follows : 1st. That the assessors survey and estimate of producing capacity under section 10, are conclusive. 2nd. That by section 20, the measure of production of spirits was determinable by the quantity of materials which the assessor should ascertain and report was used. 3rd. That the distiller must pay the " gallon " and " barrel " tax according to such measure of production of spirits, regardless of what amount was really produced. 4th. That he must pay upon at least eighty per cent. of

the producing capacity of the distillery regardless alike of the materials used, or of actual product.

Now, firstly, this decision is authorized by the express letter of the law, or as the court states it, by "the une- "quivocal language of the act;" this provision of the law establishing the collection of a *deficiency* of the "gallon" "and "barrel" tax was, in the language of the court, to "guard against fraudulent returns and to secure to gov- "ernment a tax on all spirits produced and upon all which "might have been produced," (not from a constructive ca- "pacity, but) "from the quantity of materials used."

The government rightfully assumed that the distiller would not consume a specified quantity of grain without obtaining therefrom its equivalent of alcohol, and that unless this equivalent had been paid for by the ordinary process of taxation, that the tax thereon had been evaded; hence it devised this extraordinary method of collection, "obviously to guard against fraudulent returns;" in like manner the law assumed, arbitrarily but perhaps justifiably, that distilleries would manufacture four-fifths of what they were capable of manufacturing: and hence they would tax them for four-fifths of their capacity and this upon the theory that they had produced so much; this might be harsh and unjust in many instances, but it was plainly written down in the law, and the courts were bound to enforce it, as they have done in "U. S. vs. Singer," and in "Stevenson vs. Beggs."

Now, examine the wide contrast which exists between the questions at issue in those cases and in the case at

bar; in case of "Stevenson vs. Beggs," the *survey* was made properly and was unimpeached; and the estimate of producing capacity was made in accordance with section 10, by the assessor and his skilled assistant; in case at bar there was, as admitted by the record, no such survey and estimate; here the two officers to whom was confided the duty of making the survey and estimate, found a fermenting period of seventy-two hours in the notice and in actual use;—this is what the *survey* disclosed as to fermenting period; but they were ordered by the commissioner (who has no authority to make or interfere with a survey, except to order a new one) to disregard the survey—to pay no attention to the facts which the survey disclosed as to the fermenting period, and to make up a false survey—to fabricate a report based not upon the actual survey; and return that false report to the department, and by virtue of this false survey and fabricated report to collect twenty-five per cent. more tax than the law justified.

This survey, thus admitted to be false, cannot, surely, be conclusive.

The quantity of material used, is made the measure of production in reported case, by the express language of section 20, itself, but it is nowhere said or implied, that the fermenting period as assumed by the commissioner in case at bar, shall constitute the measure of production: but on the contrary, every reason, inference and intendment of the law is against any such idea; the law provides a well guarded, clearly defined and elaborate mode for es-

tablishing a fermenting period, and by that we desire to abide.

All of the alcohol which should have been produced from amount of grain consumed was taxed by Sec, 20, upon the theory that it all had been produced, and the tax evaded; that was the *reason* of the law. The court in "Stephenson v. Beggs" so decided because it was the law, plainly written, regardless of reasons why. So likewise distillers were taxed upon 80 per cent. of their capacity, to guard still further against fraud, and the court sustained this tax because it was plainly the law, and in their opinion warranted by the constitution.

In the case at bar, the case is different; there is no law to establish one period of fermentation for use, and another period for taxation, and hence there is no warrant in the reported cases for the claim made in this case, save and except the feeble analogy which may arise in the two cases in sustaining the "producing capacity" as ascertained by the assessor according to Sec. 10.

Here, however, let us say, that no question was made in the reported case about the faithfulness or accuracy of the survey or estimate. At that time, the fermenting period adopted by the distiller under the law was in vogue and his survey was presumably made under and according to the law.

But in case at bar, this is not pretended. The assessor and his skilled assistant in making their survey, admit that the fermenting period used and recorded was seventy-two hours; and without authority, another officer charged

with a line of defined duties in reference to the revenue, orders the officers charged with the making of the survey and estimate, to set at naught the facts which their survey should attest, and make a fictitious survey. This does not establish the "true producing capacity", according, either to the law or the facts, but establishes a "false producing capacity" according to both.

Again, the provisions of Sections 19. and 20. having reference to the assessment of the "deficiency" of the "gallon" and "barrel" tax were made as was stated by the court, to "guard against fraudulent returns and to secure "to government a tax on all spirits produced and upon "all which might have been produced from the quantity "of materials used.', The entire producing capacity was not taxed, even upon the necessity by reason of which these provisions were made, viz: of guarding against fraudulent returns, but only four fifths or 80 per cent. of the "producing capacity," was thus taxed. In case at bar the commissioner decides upon and establishes an ideal "producing capacity," and then orders a tax, not upon eighty per cent. of it in analogy to the provisions regarding the "deficiency," but upon the entire one hundred per cent. of his ideal and speculative "producing capacity." Nor does the commissioner pretend that it is to guard against fraudulent returns, or against fraud in any way.

The "deficiency tax" is clearly warranted by the express letter and manifest intent of the law, though it may seem

arbitrary and unjust; hence the court could do no otherwise than to uphold it. But to provide an elaborate system for establishing "capacity," and then setting the "capacity" thus ascertained at nought, and establishing a fictitious "capacity" by a stroke of the commissioner's pen, is not only not warranted, but is contradicted by the law, and it is not believed will be sanctioned by this honorable court.

The gravamen of this action is, that this tax was "erroneous and illegal," and this court has authority to give redress (Bump's Int. Rev. Laws, p. 91) (Sec. 19, act of July 13, 1866; amend., March 2, 1867). If the admittedly false return of the assessor and his skilled assistant are conclusive in such manner as to estop the court from making inquiry whether this tax was really erroneous and illegal, then here is a class of *erroneous and illegal assessments* which this court is barred from considering, by the fiat of an assessor and his skilled assistant; also in like manner its jurisdiction is ousted, if it may not inquire into an alleged authority claimed by the commissioner, under a law of Congress, and which authority we challenge the closest scrutiny to find expressly defined, or in any way implied.

Therefore, the question is, is this an erroneous and illegal assessment? and this is a judicial question demanding a judicial inquiry. By the law, the distiller must first pay, under all circumstances, then appeal to the commissioner (Bumps Int. Rev. Laws, p. 89, sec. 44), and finally

appeal from his action to the courts (Bumps Int. Rev. Laws, p. 91). So here is the only redress against the assaults of the irresponsible and dangerous power claimed by the commissioner, and denied by the plaintiffs in error.

Reference is made hereby to "the Regulations and "Instructions concerning the tax on distilled spirits, under "act of July 20, 1868," issued by the Commissioner of Internal Revenue, on the 3d of August, 1868 (p. 7, tit. "Survey"); also to "Supplemental Regulations, etc.," issued by commissioner on Sept. 30, 1868, and especially to "Regulations and Instructions concerning the tax on "distilled spirits, under the act of July 20, 1868, as amend-"ed by act of April 10, 1869," which were issued by the Commissioner of Internal Revenue on April 22, 1869 (p. 8). It will be seen that the commissioner stood upon our precise ground in the issuing of all these instructions, and it can nowhere be found that he has given any adequate reason for his "change of base;" protesting, however, that the commissioner has no authority to issue orders in reference to the fermenting period not in harmony with the law; and our only object in citing his opinion is to show that his belief on the subject of the determination of a fermenting period did, for the first year and a half of the operation of the law, coincide with our own, and likewise to show that no necessity existed, during all this time (which was suffiiciently long for a full test of the law) for any abnormal action of the commissioner on the subject of the fermenting period.

The language of the 6th section of the act of July 20,

1868, imperatively demands a fixed period of fermentation by the distiller to be given in his notice, the object being, as stated by Mr. Schenck in debate, to tax the per diem capacity, and to remove all *uncertainty* as to the fermenting period, as that period was an essential element in the basis of calculating that capacity. The debates show that it was intended to secure the right to distillers to fix and use their own periods of fermentation, and that the word "will" did secure that right, and for that reason was retained and the amendment of Mr. Beck withdrawn. On its phraseology "usually takes to," Mr. Schenck said "the amendment would make it very vague, even to the rules of distillers themselves," and that "*our* object is to charge upon the *capacity*, among other things, and if we leave an *uncertainty* about this, we run the risk of *not* getting the *capacity* taxed." Mr. Beck regarded any control over this right of distillers as a penalty and punishment of them in matters over which they had no control.

These debates further show that it was not only the intention so to word this section as to give distillers "margin enough," but that it was intended to fix and settle by *this* section the rule for a fermenting period as an essential element in the basis of calculating this capacity tax, and if any uncertainty was incorporated in it, it might defeat that tax.

How could any uncertainty in this section affect that capacity tax, if it only binds the distillers, and not the government? If, by section 103, they intended to empower the Commissioner of Internal Revenue to fix a

fermenting period by rules and regulations, why require the distiller to fix his own period in section 6? Such a construction would simply make that provision a mere trap—a *dead fall* to him. It requires no wide range of reflection to see its effect. The distiller fixes in his notice a period of ninety-six or seventy-two hours as required and necessary for that class of alcoholic spirit he designs manufacturing, and to this period he is confined under heavy penalties in the act. Notwithstanding this fermenting period is "provided for" in section 6, in the very language of section 103, yet the Commissioner of Internal Revenue claims under section 103 in making regulations for cases "not otherwise provided for" "necessary by reason of any change of law in relation to Internal Revenue made by this act," that he can fix and establish a period of sixty, forty-eight, twenty-four or other number of hours as a fermenting period, as a basis of calculating the per diem capacity for taxation, and consequently of the gallon and barrel taxes, and upon the same basis of calculation of the 80 per cent, deficiency tax, all of which depend upon the same basis of calculation.

Can this be so? Is such power and discretion given to the commissioner?

He has, in his letter of instructions to assessors, in making surveys, for ascertaining the taxable capacity of distilleries, per diem, and other capacity and productive taxes, said plainly, that, "distillers sometimes insist that they cannot produce the particular kind or brand of spirits, which they are in the habit of manufacturing, without us-

ing a longer fermenting period than is allowed by these rules. Section six of said act affords the distiller ample opportunity to take any period he may desire by specifying such period in his form, 27; but as taxation is based upon capacity to produce spirits, as described in section four, and not to produce this or that particular brand, and as the spirit described in section four is successfully produced, within the period named, surveys are, therefore, made accordingly, and the taxation is thereby rendered uniform," and therefore "forty-eight hours is prescribed as the *maximum* period to be allowed for fermentation in sweet mash distilleries," as "the period necessary to enable the distiller to ferment each tub of mash."

Here, then is a distinct claim of power in the commissioner, first to fix any fermenting period he may think proper, and this we most emphatically deny to be the proper construction of sections 6, and 103, considered together, or separately; here is also, a distinct avowal of the purpose to fix upon such a period of fermentation as will produce the greatest amount or product of taxable spirit, as defined in said section four, for the benefit of the government, for taxation, without regard to the interests, or business of the distiller. The commissioner says such spirit as is *defined and taxable* under section 4, may be produced from grain by forty-eight hours fermentation, and as more of such taxable spirit in per diem, bushel, and in gallon, barrel and eighty per cent. deficiency, taxes may be produced by a forty-eight hour fermenting period, than by a seventy-two hour fermentation, the distiller must ac-

count and pay on a basis of forty-eight hours; notwithstanding his interests in getting all the spirit out of the grain he buys for this purpose, and the taxable quantity and quality of the product may be sacrificed by his rules. Is this the intention of the legislature, as expressed in this act?

If this is so, no man can engage in this branch of manufacturing industry, until he is advised by the commissioner of Internal Revenue, what fermentation he may use; for if he cannot produce the kind of product he intends to manufacture, he cannot pursue that line of manufactures.

It is manifest to every one, that no distiller can afford to carry on a distillery on seventy-two hours fermenting period, and pay taxes on a forty-eight hour fermentation; as the difference would add between a fourth and a third more taxes upon his business and products; 1st. In adding to the per diem capacity; 2nd. In adding to the gallon tax at the average of three and a half gallon spirits per bushel; 3rd. In adding eighty per cent. to the gallon product, as a deficiency tax, on every bushel so estimated and not actually used or needed, and, 4th and lastly by adding the barrel tax of $4 on every such supposed or estimated product, from the *assumed* bushels of the per diem capacity, Now add these several taxes together, and it will be apparent that no distiller can afford to pursue his business under such accumulated taxes imposed by such a construction of the law. Such a mode of taxation, would destroy this branch of productive industry.

The commissioner claims simply, that the legislature intended that all distillation of spirit from grain, should be conducted upon such period of fermentation as would, in his opinion, produce the greatest amount of taxable spirits under its definition in section 4, without regard to the business designs and interests of persons engaged in its manufacture. In other words, this branch of manufactures must be conducted in such manner as will produce the most taxes, whatever effect that mode or manner may have upon the business or interests of those engaged in it. His instructions, above quoted lay down the law under that act, in this broad and unlimited sense. And the survey in this case was made in accordance with it.

Beside the above view, we may add that the commissioner issued his first and second instructions to surveyors in full accordance with the period of fermentation fixed in distillers' notices.

If sustained in his last instructions to limit the fermentation to forty-eight hours, he simply adds from twenty-five to thirty-three per cent. to the per diem capacity of distilleries using seventy-two hours, and from one third to one half to those using ninety-six hours.

We have alleged in the declaration that the survey and assessment were both illegally made, and that the assessment and collection were illegal and both in excess of the true amounts under the act, and that the collections were enforced, and paid under protest. And all these allegations are admitted by the demurrer.

To recapitulate: (1.) The law taxes the capacity of our distillery to mash and ferment grain. (2.) The time which each distiller will take to ferment, he is allowed and required to determine for himself before he commences operating, and to strictly abide by the same. (3.) The corollary is therefore obvious, as we think, that the law taxed the capacity of our distillery to mash and ferment grain according to the mode and time of fermentation provided for by the law and actually used, and not according to a mode and time of fermentation contrary and repugnant to the law, and not used at all. (4.) If the commissioner's action in prescribing a fermenting period is proper, then the provision of section six, as to distiller's notice of time of fermenting and the action of congress in making such a provision are utterly incomprehensible. (5,) As between the distiller's notice as to length of fermenting period, and the "survey" of the assessor on the same subject, the latter is conclusive while it remains, and this only upon the assumption of its truth; but when the distiller's notice is admitted to be true, and the assessors survey to be false, the truth should prevail over the acknowledged errora in all courts of *justice*. (6.) That by the face of the record, the tax which we claim a refunding of, was erroneous and illegal. (7.) That while the law might have given authority to the commissioner to order the assessment of this tax as it is now claimed, in which case it might have been within the limits of constitutional power and hence proper; yet that congress did *not* confer this power, hence its exercise was unauthorized and void. (8.) And

that redress for this invasion of a citizen's rights, is by express law denied to all other authority, and expressly confided to the U. S. Courts.

We can but entertain the belief and expectation that this court will afford plaintiff's protection from this wrong, and a remedy, by a judgment for refunding the sums illegally exacted.

SCATES & WHITNEY,

Attorneys for Plaintiffs in Error.

No. .....AGENDA NO..... .....

Supreme Court,

OF THE UNITED STATES,

October Term, A. D. 1873.

HERMAN J. PAHLMAN, ET. ALS.,
Plaintiffs' in Error.

VS.

HERMAN RASTER.
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT OF PLAINTIFFS' IN ERROR.

FILED.....1873.

.....*Clerk.*

SCATES & WHITNEY,
Attorneys for Plaintiffs' Error.

Gilchrist & Smith, Printers and Publishers, 143 & 145 Monroe Street, Chicago.

SUPREME COURT

Of the United States,

OCTOBER TERM A. D. 1873.

H. J. PAHLMAN, et. al.
Plaintiffs.

vs.

HERMAN RASTER,
Defendant.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

REPLY OF PLAINTIFFS IN ERROR.

SCATES & WHITNEY,
Attorneys for Plaintiffs in Error.

IN THE SUPREME COURT

OF THE UNITED STATES,

OCTOBER TERM, A. D. 1873.

H. J. PAHLMAN, et. al.
Plaintiffs.
vs.
HERMAN RASTER,
Defendant.

No. 560.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

REPLY OF PLAINTIFFS IN ERROR.

Upon page seven of defendants brief, it is asserted that the Commissioner of Internal Revenue in prescribing a fermenting period, left some discretion to the assessor and his skilled assistant about such period. By reference to the text of the instructions, this will, we think, be found to be an error; or, at the very best, if any discretion is left, it is only in *extraordinary* cases as is conceded, and as this is nowhere pretended to be an *extraordinary* case, the argument of defendants would not seem to apply.

The cases of Stevenson vs. Beggs, and of U. S. vs. Singer, which have been invoked in behalf of defendants in error (p. 8 of brief,) have been abundantly and conclusively shown in argument of Plaintiffs in error, to not apply to this case at all; those cases arose upon other and different provisions of the law, and had ~~had no~~ reference

exclusively to the "deficiency" of the "gallon" and "barrel" tax; and it is believed that the reliance of the defendants in error upon these cases, well attests the paucity of argument and absence of all authority to sustain this fictitious fermenting period.

Defendant in error insists that the law allows the Commissioner to determine the precise number of hours at which beer will attain the greatest producing capacity all over the United States, or in other words, to fix upon an uniform period at which beer will get ripe as well in the 30 degrees of latitude as in the 45 degrees.

Now, upon the authority of the debates in Congress, when the law in question was being matured, as well as upon all scientific and chemical researches, (see our argument, pp. 10, 12), we do not hesitate to brand this attempt of the Commissioner of Internal Revenue as impossible to be attained.

No *uniform* fermenting period is possible any more than an uniform climate is possible, and the law-makers by their allowing to each distiller his option (in Sec. 6), of choosing and recording his fermenting period, recognized this manifest and palpable scientific truth.

We also again refer to the Congressional Debates (pp. 10, 11, 12, of our argument) in attestation of the same fact.

Defendant in error says (p. 9), if * * he "the assessor," and the surveyor are to adopt a point "of time "suggested *by another*, and that not as the point of great-

" est capacity, but as one selected by himself for reasons " of which he need give no account, such *capacity* never " will be ascertained," &c. (The italics are not ours.)

Singularly enough, however, the law-makers in considering and maturing the law, compelled the distiller to himself select " a point of time" at which he must arrest fermentation, and this for the very reason of *providing against the uncertainty of getting the capacity taxed*, so that, while the solicitute of the learned Attorney General about having the capacity tax made *certain*, is a worthy object to be attended to, it should at the same time be considered that Congress was fully alive to its importance and made full provision for it, as that body thought, by providing for a sworn notice and its faithful observance (see our argument p. 11). Such being the case it seems unnecessary to argue that this compelling the selection of a fermenting period was designed to be otherwise than a trap to catch the conscience of the distiller in.

This argument is almost incomprehensible to us. Section 6 *requires and compels* the distiller to select " a point of time," and here we find the defendant in error, while professing to maintain and be governed by the law, virtually declaring that the assessor and his skilled assistant ought to totally disregard and set at naught this important provision of it.

Plaintiffs in error insist that section 6 is as important a branch of the law as any other portion, and that it is binding upon, not alone the distiller, but upon the assessor as well. If the distiller is required to select and adhere

to a fixed fermenting period, it has some utility—some reasonable purpose.

And we do not hesitate to assert that no object whatever can be shown for this provision, unless the fermenting period which the distiller is required to select and put on record, and abide by, is the period by which, likewise, he must be taxed.

One word more: This law was not intended to cripple and destroy the distilling business; neither was it designed to further interfere with such business than might be necessary to procure a stated tax upon the spirits produced and upon the capacity to produce.

Self-~~intest~~ interest alone would obviously compel each distiller to employ his greatest producing capacity, and in fixing his fermenting period, he manifestly adopts such period as will be capable of producing the most spirits from the grain employed. And that the law was intended to allow the distiller (and not the assessor) to determine for himself what fermenting period would conform to the true producing capacity, is manifest from the fact that the distiller, (and not the assessor,) was charged with the selection and putting on record of such fermenting period. Sundry statements and figures *dehors* the record are given on page 10 of defendants brief. We do not examine them, as we suppose the Court does not wish to look beyond the record.

SCATES & WHITNEY,
Attorneys for Plaintiffs in Error.

No..... Agenda No.....

SUPREME COURT

Of the United States,

OCTOBER TERM, A. D. 1873.

HERMAN J. PAHLMAN, *et al.*,
Plaintiffs in Error.

vs.

HERMAN RASTER,
Defendant in Error.

Error to Circuit Court of the United States for the Northern District of Illinois.

REPLY OF PLAINTIFF IN ERROR.

FILED,.....1874.

.....*Clerk*

SCATES & WHITNEY,
Attorneys for Plaintiffs in Error.

SHEA SMITH & CO., PRINTERS, 143 & 145 MONROE ST.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

H. I. PAHLMAN & COMPANY, *Plaintiffs in Error*,
vs.
HERMAN RASTER, *Collector, &c.*
} No. 566.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

H. I. PAHLMAN & COMPANY, *Plaintiffs in Error,*
vs.
HERMAN RASTER, *Collector, &c.*
} No. 566.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an action brought by the plaintiffs in error (also plaintiffs below) to recover of the defendant, as collector of internal revenue, certain money paid to him by them under protest, as tax upon distilling from February to July, inclusive, in 1871, the amount sued for being, as was claimed by them, so much *in excess* of what was really due.

The record presents an issue of law made upon a general demurrer to a declaration containing several counts, all of which, excepting the two first, it is agreed shall be stricken out.

The question of law involved is, whether, under the act of 1868, ch. 186, sec. 10, (15 Stat., 129,) the assessor and surveyor, in estimating a *true producing capacity* for a distillery, have power to fix upon a certain period

(here forty-eight hours) as the *true fermenting period, or* are bound upon this point by the period (here seventy-two hours) of which, in his *application*, (statute above cited, sec. 5,) the distiller has stated that he would make use, and of which, in point of fact, he did make use.

The plaintiffs deny, and the defendants assert the existence of this power.

The law upon the subject of applications by distillers is contained in section 6 of the statute above referred to, and is—

"That every person engaged in, or intending to be engaged in, the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and if a company or firm, the name and place of residence of each member thereof, the place where said business is to be carried on, and whether of distilling or rectifying. And if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and number of the building. In case of a distiller, the notice shall also state the kind of stills, and the cubic contents thereof, the number and kind of boilers, the number of mash tubs and fermenting tubs, and the cubic contents of each tub, the number of receiving cisterns, and the cubic contents of each cistern, together with a particular description of the lot or tract of land on which the distillery is situated, with the size and description of the buildings thereon, and of what material constructed. The notice shall also state the number of hours in which the distiller will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, and the names and residence of every person interested or to be interested in the business, and that said distillery and the premises connected therewith are

not within six hundred feet of any premises authorized to be used for rectifying or refining distilled spirits by any process. * * * In case of any change in the location, form, capacity, ownership, agency, superintendency, or in the persons interested in the business of such distillery or rectifying establishment, or in the time of fermenting the mash or beer, notice thereof, in writing, shall be given to the said assessor or to the assistant assessor of the division within twenty-four hours of said change."

By section 10 of the same act, it is provided that "every assessor shall proceed * * with the aid of some competent and skilful person, to be designated by the Commissioner of Internal Revenue, to make survey of each distillery registered or intended to be registered for the production of spirits in his district, to estimate and determine its true producing capacity, &c."

By section 20 it is further provided—

"That on receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the

distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act."

By section 2 the Commissioner of Internal Revenue is authorized "to adopt and prescribe for use such * * means for ascertaining the producing capacity of any mash, wort, or beer used, or to be used, in the production of distilled spirits, and the strength and quantity of spirits subject to such tax, as he may deem necessary," and also empowered him (section 10) to revise the surveys which, in his opinion, require it, and to have new surveys made.

We also refer to the provisions of section 103.

In accordance with his construction of these powers, upon the 8th of March, 1870, the Commissioner issued a general circular regulating surveys, containing, upon the matter before the court, the following instructions:

"The true spirit-producing capacity of a grain distillery is mainly determined by its fermenting capacity, but as this is sometimes affected by the modes of mashing and distilling, these are therefore to be considered in such cases.

"The surveyor having ascertained, by measurement, the cubic contents of the fermenting tubs, finds it necessary to determine—1st. The number of dry inches to be allowed each tub for fermentation. 2d. The period necessary to enable the distiller to ferment each tub of mash. 3d. The number of gallons of spirits that can be produced from a bushel of grain.

"These are questions coming within the discretion and judgment of the assessor and his skilful assistant, with which this office has no disposition to interfere. But it has been thought proper for the guidance of the surveyor, that this office should prescribe certain rules on these three points based upon authentic information

derived from the records of the office and other reliable sources. Surveyors are, therefore, to be governed by the following rules in fixing the capacity of a distillery, except where they find that they do not correctly determine its capacity. If the capacity is different from that indicated by these rules, they are to report it according to the fact, and if smaller, assigning in the report the reasons therefor, and if such reasons are not satisfactory to the Commissioner, he will order a new survey to be made.

"It is believed that no reasons exist to justify the fixing of a less capacity than that arrived at by these rules, except in the one case hereinafter stated.

"The rule for determining the allowance of dry inches is as follows: For fermenting tubs five feet in depth and under, an allowance of seven inches for rye and three inches for corn; for each foot in excess of five feet, one-half inch for rye and four-tenths of an inch for corn. This rule is based on the fact, as found by the measurement of tubs in use in the United States, that the maximum depth is fifteen feet, and the average minimum depth five feet, while the maximum allowance of dry inches for rye is 12, and for corn, 7, and the minimum allowance for rye is (7) seven, and for corn, three.

"Forty-eight hours is prescribed as the maximum period to be allowed for fermentation in sweet mash distilleries.

"The only exception to this rule that is thought to be justified by sufficient reasons, is where the mashing is done by hand, where hot water is the only heating agent, and the distillation is in copper by furnace heat. It is believed that with this imperfect mode of stirring and regulating the temperature, such a perfectly fermented beer cannot be uniformly produced, as is necessary for distillation in copper with furnace heat, to prevent occasional burning of the still; in such cases 72 hours will be allowed for fermentation.

"This is the only instance in which the mode of distillation is considered as affecting the period to be allowed for fermentation. Seventy-two hours is the maximum period to be allowed for fermentation in sour mash distilleries.

"This is based on the fact that where spent beer, or beer in process of fermentation, or both, are the only fermenting agents used; fermentation is not so rapid as where yeast is used, and, therefore, this rule applies to all sour mash distilleries, whatever the mode of heating, stirring, and distilling may be.

"The period, as before stated, is estimated from the time of yeasting or breaking up: an exception is made to this rule in the case of hand mash distilleries where the mashing and fermenting is done in the same tubs.

"In such cases, the time will be estimated from the time of the first scalding of the meal. All the tubs will be embraced in the estimate of the capacity, and ninety-six hours will be allowed for fermentation, as in each case it necessarily includes the twenty-four hours used for mashing.

"Where the distiller prefers, he may set aside certain of his tubs to be used exclusively for mashing, marking them distinctly as such, and in such cases the computation will be made on the tubs used for fermenting, and the period be fixed from the time of yeasting or breaking up, instead of from the time of commencing the mashing.

"In estimating the yield per bushel, the minimum prescribed is three and a half gallons where the distillation is by steam, without the use of the coil; where the coil is used, three gallons; and where the distillation is in copper by furnace heat, two and a half gallons. In many instances it is found that the actual production exceeds these amounts; where that is the case, the survey should be based upon the amount which it is found can be actually produced.

"The amount of grain that can be used in a distillery is ascertained under the rule prescribed in section 20, act of July 20, 1868, providing that forty-five gallons of mash shall represent not less than one bushel of grain, and in the amendment thereto, section 1, act of April 10, 1869, it is provided 'that in distilleries having a producing capacity of less than one hundred gallons in twenty-four hours and in which grain or meal is mashed by hand and without the use of steam,

sixty gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain.'

"Where, however, it is found that the distiller uses a thicker mash, the estimate will be made according to the fact, but when a thinner mash is used, the estimate will be according to the statutory rule.

"The capacity to be determined is not the capacity to make this or that particular kind or brand of distilled spirits, but the capacity to make distilled spirits as described in section 4 of the act of July 20, 1868.

"Distillers sometimes insist that they cannot produce the particular kind or brand of spirits which they are in the habit of manufacturing, without using a longer fermenting period than is allowed by these rules. Section 6 of said act affords the distiller ample opportunity to take any period he may desire, by specifying such period in his Form 27, but as taxation is based upon capacity to produce spirits as described in section 4, and not to produce this or that particular brand, and as the spirit described in section 4, successfully produced within the period named, surveys are, therefore, made accordingly, and the taxation is thereby rendered uniform."

It will be observed that the Commissioner in these instructions has prescribed only a maximum *for ordinary cases*, expressly reserving to the surveyor and assessor a right to report exceptional cases for special action, adding by way of caution an expression of his *belief* that there is only one case justifying and fixing a less capacity than that to be ascertained by such rules. This observation seems called for by passages in the brief of the learned counsel of the plaintiffs, which perhaps go upon the contrary supposition.

We submit that there is nothing in the statements of the declaration admitted by the demurrer, or in

the circular of the Commissioner, that justifies this suggestion.

The present is an addition to the class of cases to which the United States *vs.* Singer, 15 Wall., 111, and Beggs *vs.* Stevenson, 17 Wall., unreported as yet, belong.

In the former case, the facts occurred in 1869, and were, that the distiller had truly returned all spirit actually made, which, however, was less than eighty per cent. of the *capacity* as assigned by the survey. The court analyses the provisions of the statute upon the subjects, *Actual production* and *Capacity to produce*, and affirms the constitutionality of the latter, which had been questioned by the defendant.

In the latter case, the facts occurred in 1868, and were, that the distiller had correctly returned his actual production, and this was more than eighty per cent. of the producing capacity of his distillery; nothing appearing as to its percentage of the capacity as determined by the survey. The survey, however, had assigned to the distillery a capacity of producing three and a quarter gallons of spirits for every bushel of grain, and the returns were of a quantity less than that. The court held, that the survey and estimate of the producing capacity, under the tenth section, was conclusive, except as revised by the Commissioner; "and the extent of liability to taxation was, under the act of Congress, directed to be measured, not by the actual product of spirits, but by what should have been the product of the materials used according to the estimate made under section ten."

In the present case, the plaintiffs commenced business as distillers more than four months after the issue of the above circular.

The tax upon alcoholic spirit attaches to it while still a part of the beer in which it originates, and as soon as it is in existence there. (Section 4.) We submit, in this connection, that the provision (section 2) authorizing the Commissioner to adopt and prescribe means for ascertaining the *producing capacity* of such beer, necessarily intrusts to him, in connection with the *skilful* surveyor, his agent, the power of selecting the point of time for applying such means—that is, the point at which such beer becomes most productive, or is *ripe*. If, in such case, he and the surveyor are to adopt a point of time suggested *by another* and that not as the point of greatest capacity but as one selected by himself for reasons of which he need give no account, such *capacity* never will be ascertained, and therefore in such event the law must be defeated. Again: the *power—i. e., true producing capacity* of a distillery—must depend upon the capacity of its tubs, combined with the speed with which each separate process can, to the best advantage, be completed. A *true* producing capacity implies a *true* fermenting period. The rules for measuring tubs prevent any cause for uncertainty there; and, for all that has been or probably can be said to the contrary, nature is as uniform in her "fermenting periods," for considerable quantities of beer and lengths of time, as in any other of those operations which render her uniformity proverbial. It seems, upon consideration, to be entirely

reasonable to allow the Commissioner of Internal Revenue to determine, as matter of science combined with extensive observation, what within the United States, with rare exceptions, must be the *maximum* fermenting period, and equally so for a skilled surveyor to determine what is the *true fermenting period* of a certain distillery whose location and methods of operation he has examined.

In this connection we have obtained from the Commissioner a statement of the recent experience of his office in connection with surveys and deficiencies in general, and especially in that part of the United States from which this case comes. He says that, in general, the actual production almost always exceeds 80 per cent. upon the capacity to produce, estimated under the above circular. He submitted to us statistics which cover the first district in Wisconsin, and the first district in Illinois, besides districts in Ohio and Kentucky. For the first, in November and December, 1873, and January, 1874, the aggregate 80 per cent. for twenty-five returns was 371,707 gallons; the actual product 381,428 gallons; with only five deficiences, of, in all, some 2,623 gallons, 1,322 of which were, because, in two cases, applications for relief on account of suspended work were *irregular*. In the second, for October, November, and December, 1873, the aggregate 80 per cent. was 1,735,707, whilst the actual returns were 1,901,106 gallons, with but one deficiency in twenty-seven returns, and that of only 549 gallons. The other returns were to the same effect: The general aggregate of all the statistics submitted being—Eighty per cent., 3,383,872 gallons; Actual production, 3,922,543

gallons; Deficiency, 4,446 gallons; the whole number of returns being 154, and the returns in which deficiencies occurred, 15.

That which in opposition to this construction is submitted by the learned counsel for the plaintiffs, from a consideration of the sixth section, seems to be answered by what is said by the court in United States *vs.* Singer, above—that is, that those requirements are confined to an ascertainment of the *actual production*, &c.

If there be, in the nature of things, a *true* fermenting period, as distinguished from a period actually used for fermenting, it follows that a requirement that a distiller shall, in his *application*, state the number of hours which he will ferment each tub, is no more conclusive upon the officers making a survey, than is his statement of the cubic contents of each tub, required of him by the same section.

Again: the distiller may state in his application that he will ferment for a *less* period than the survey afterwards assigns as the true period. The chance of this happening will be a reason for requiring him not to change the period without giving the due notice specified in the sixth section.

Even if no reason, connected with the amount of tax to be levied, can be assigned for requiring this statement in the distiller's application, it may be referred to an intention, manifest perhaps in the minutiæ demanded elsewhere in this act, to require particulars as to the business about to be set up, for the general purpose of *identifying* it, and so of avoiding apprehended frauds not exactly defined, but of which warning is given in the maxim, Fraus latet *in generalibus*.

In general, however, it seems enough to say that the statute is as careful in requiring from the distiller minute data for ascertaining actual results, contemplated or accomplished, as it is in leaving the surveyors to use their *skill* untrammelled, under the general superintendence of the Commissioner, in determining what *ought* to be the result, at least with a margin of 20 per cent.; and that it will be injurious to confound matters intended to be kept apart, if this *skill* is to be embarrassed by the rules of practice of persons not required to be skilful—persons of whom all that the law knows is, that they *intend to become* distillers.

G. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

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